IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TED BEHRENS and LAURA BEHRENS, husband and wife, individually and as next friend of HARLEIGH BEHRENS, a minor, Plaintiffs/Appellants, v. CITY OF CASA GRANDE, a municipal corporation, Defendant/Appellee.	2 CA-CV 2005-0134 2 CA-CV 2006-0007 (Consolidated) DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. CV2001-00625 and CV2005-00510

Honorable R. Douglas Holt, Judge

AFFIRMED

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and

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B R A M M E R, Judge.

¶1 Appellant Ted Behrens was injured on a merry-go-round at a park owned by appellee City of Casa Grande. After the trial court granted the City's motion for summary judgment, Behrens appealed, arguing the trial court erred in applying the Recreational Use statute, A.R.S. § 33-1551, to this case. Behrens also contends that even if § 33-1551 applies, there were disputed material facts that should have precluded summary judgment on the issue of whether the City's conduct was wilful, malicious, or grossly negligent. Finally, Behrens asserts the court erred in denying him leave to amend his complaint to add claims for negligence against individual City employees and in dismissing a separate lawsuit against those same employees. We affirm.

Factual and Procedural Background

¶2 On appeal from a summary judgment, we view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom summary judgment was granted. *Walk v. Ring*, 202 Ariz. 310, ¶ 3, 44 P.3d 990, 992 (2002). On April 2, 2000, Behrens and his extended family went to the City-owned Rancho Grande Park. Three young children got on the merry-go-round with Behrens, and he told them to sit down and hold on. Behrens remained standing, "[t]he merry-go-round was suddenly jerked" by Behrens' teenaged nephews, and Behrens "was thrust across the merry-go-round." Behrens

remembered striking bars of the merry-go-round once he lost his grip and landing in the adjacent sand. Behrens sustained fractured vertebrae in the lower part of his neck and asserts he has been diagnosed with incomplete quadriplegia.

¶3 Behrens and his wife, individually and on behalf of their child, Harleigh Behrens, sued the City in March 2001. Behrens alleged the City "knew or should have known the merry-go-round and the premises in question were negligently, dangerously and defectively designed, constructed, repaired, maintained, and supervised." Behrens claimed the City had a duty to warn the public about its unsafe playground equipment, that it failed to adequately repair the equipment, and failed to train and supervise staff as to that equipment. Behrens alleged this conduct was "wilful, malicious or grossly negligent."

¶4 The City moved for summary judgment in October 2002, arguing that Arizona's Recreational Use statute rendered it immune from liability absent gross negligence or wilful or malicious conduct, and that Behrens was unable to establish gross negligence on the part of the City. In his opposition to the motion, Behrens argued the Recreational Use statute was unconstitutional and did not apply to the circumstances of this case. His contention that he had sufficient evidence of gross negligence focused on the presence of the merry-go-round and its lack of a speed governor, the lack of sufficient sand to cushion a fall from the apparatus, and insufficient supervision and training of the person who maintained the playground.

¶5 In December 2003, the trial court determined the Recreational Use statute was constitutional,[1] applied to the case, and Behrens therefore was required to prove gross negligence. In August 2004, Behrens attempted to amend his complaint to add as defendants five City employees he had previously deposed, arguing these depositions, as well as his recent discovery of letters to the City from its insurer, "resulted in new evidence" that should allow him to amend. In October 2004, the trial court denied Behrens leave to amend, stating he had "known for years the involvement of [the employees]" and the claims against them "simply come too late in time." With respect to the motion for summary judgment, the court determined that, "although there are numerous fact questions as to ordinary negligence, there is no question on gross negligence that require[s] submission to a jury." (Emphasis removed.) It therefore granted summary judgment in favor of the City.

¶6 In April 2005, Behrens filed a new complaint, naming as defendants the same five City employees he had attempted to add as defendants to the first lawsuit. The trial court dismissed the new complaint, finding it was barred by the statute of limitations and the Notice of Claim statute, A.R.S. § 12-821.01, and because the court had already denied the August 2004 motion to amend the complaint that sought to add the individuals as defendants in the previous case. These two cases were consolidated for purposes of appeal.

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[1]On appeal, Behrens does not challenge the trial court's ruling that A.R.S. § 33-1551 is constitutional, apparently in light of our supreme court's decision in *Dickey v. City of Flagstaff*, 205 Ariz. 1, 66 P.3d 44 (2003).

Discussion

Applicability of Recreational Use Statute

¶7 Section 33-1551(A) protects "[a] public or private owner, easement holder, lessee or occupant of premises" from liability "to a recreational or educational user except upon a showing . . . of wilful, malicious or grossly negligent conduct" that "was a direct cause of the injury to the recreational or educational user." Behrens contends the trial court erred by applying the statute to his claims. "We . . . review de novo whether the recreational use immunity statute applies to this case." *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 5, 71 P.3d 359, 361 (App. 2003). Because the statute limits common law liability, "'we must construe it strictly to avoid any overbroad statutory interpretation that would give unintended immunity and take away a right of action.'" *Id., quoting Smith v. Ariz. Bd. of Regents*, 195 Ariz. 214, ¶ 9, 986 P.2d 247, 249 (App. 1993).

¶8 In his opening brief, Behrens argued the protections of § 33-1551 do not apply because "defective playground equipment in an urban park is not encompassed within the statutory definition of 'premises.'" He also argued he "was not injured while engaging in the type of recreational activity from which [the City] is protected against liability by the statute." However, he concedes in his reply brief that he is obligated "to demonstrate evidence of gross negligence in order to proceed to trial against the City on a 'premises liability' claim." (Emphasis deleted.) *See, e.g., Armenta*, 205 Ariz. 367, ¶ 9, 71 P.3d at 362 (applying § 33-1551 to soccer goal in city park). Accordingly, we do not address these arguments.

¶9 In a related argument, Behrens contends the statute does not apply because his claims "against the city . . . for common law negligence in city-wide administration, supervision and operation of its municipal business [are] not subject to protection by the recreational use statute." In support of his argument, Behrens relies primarily on *Smith*. There, the plaintiff was injured at an event held in "an open area" of a university campus. 195 Ariz. 214, ¶ 2, 986 P.2d at 248. The plaintiff was injured while using "a jumping apparatus consisting of a combination of a trampoline and bungee cord" when he "collided with the trampoline frame." *Id.* ¶ 3. Division One of this court concluded the recreational use immunity statute did not apply, in part, because the plaintiff "was not injured by a condition of the land but by a piece of equipment stationed temporarily on the campus premises." *Id.* ¶ 14. The court also noted the plaintiff

> did not allege that some condition of the premises owned by [the university] caused the injury. Instead, he asserted that [the university] permitted an inherently dangerous activity to which it invited students and the public and that it negligently supervised the activities of the defendants who provided the [trampoline apparatus]. Thus, [the plaintiff's] lawsuit *does not truly hinge on premises liability, which the recreation use statute addresses, but rather involves negligent placement of and supervision over a dangerous apparatus*.

Id. ¶ 20 (emphasis added). Thus, Behrens argues § 33-1551 does not apply because he characterizes his claims as something other than premises liability.

¶10 *Smith*, however, is readily distinguishable. There, the court determined the temporary "commercial apparatus" did not fall within the statutory definition of "premises"

because it had no "relation to the usual use of the property." 195 Ariz. 214, ¶¶ 17, 19, 986 P.2d at 251. Here, in contrast, Behrens alleges the condition of the permanently installed merry-go-round and the surface of the ground surrounding it caused his injury. Section 33-1551 includes in its definition of "premises" "any building, improvement, fixture, water conveyance system, body of water, channel, canal or lateral, road, trail or structure on such lands." When a plaintiff's entire action arises from injuries stemming from the use of such a structure, § 33-1551 applies regardless of how the plaintiff characterizes his or her claim. Although we agree § 33-1551 would not provide protection to landowners for liability from injuries a recreational user suffered that stemmed from some danger unrelated to the premises, even if the injury occurred on the premises, that is not this case. As we previously noted, Behrens has conceded the park and merry-go-round are "premises" within the statutory definition. His injuries occurred because of his use of those premises.[2]

¶11 Moreover, Behrens does not explain why § 33-1551 does not encompass claims he describes as the City's negligent "administration, supervision and operation of its

[2]Behrens also relies on *Taylor v. Roosevelt Irrigation Dist.,* 72 Ariz. 160, 232 P.2d 107 (1951), asserting that case "refutes [the City's] position that [it is] entitled to immunity from liability for common law negligence claims." Our supreme court in *Taylor* stated, "[t]here are no constitutional or statutory provisions exempting municipalities or political subdivisions from tort liability when committed in the prosecution of either governmental or proprietary activities," pointing out that immunity for "purely governmental activities" is derived from the common law. *Id.* at 164, 232 P.2d at 109. We fail to see what relevance this case, decided in 1951 and addressing common law immunities, has to analysis of a statutory provision adopted in 1983 that explicitly provides municipal landowners qualified immunity. *See* 1983 Ariz. Sess. Laws, ch. 82, § 1.

municipal business" beyond asserting that those claims are not "premises liability" claims. As the City correctly notes, nothing in the language of § 33-1551 limits its application to a particular type of claim or theory of liability as long as the "wilful, malicious or grossly negligent conduct . . . was a direct cause of the injury to the recreational or educational user." Assuming, arguendo, that the statute applies only to "premises liability" claims, *Black's Law Dictionary* 1219 (8th ed. 2004) defines "premises liability" as "[a] landowner's . . . tort liability for conditions or activities on [its] premises." A landowner's negligence in failing to properly manage its premises or supervise and train the employees that maintain its premises that results in an injury-causing dangerous condition on those premises clearly would fall under this definition. *See, e.g., Hardy v. Gullo*, 475 N.Y.S.2d 1018, 1019 (N.Y. Sup. Ct. 1984) (applying recreational use statute to claim defendant "was negligent in its supervision and maintenance" of premises).

¶12 Additionally, although we must not interpret § 33-1551 to provide too broad an immunity, *see Armenta*, 205 Ariz. 367, ¶ 5, 71 P.3d at 361, we also must not interpret it so narrowly as to render it ineffective. *See Graf v. Whitaker*, 192 Ariz. 403, ¶ 14, 966 P.2d 1007, 1011 (App. 1998) (court must "'avoid construction of statutes which would render them meaningless or of no effect'"), *quoting State v. Clifton Lodge No. 1174, Benevolent & Protective Order of Elks*, 20 Ariz. App. 512, 513, 514 P.2d 265, 266 (1973). If a plaintiff in an action against a municipality or business could avoid the statute's application by alleging the defendant had been negligent in managing the premises, or in supervising and

training its employees who maintained the premises, rather than some more direct action or inaction by the landowner, the statute would, at best, offer only negligible protection.[3]

¶13 Behrens also argues "public policy prohibits immunity to a municipality exhibiting careless disregard for public safety." Because he raises this argument for the first time in his reply brief, we do not address it. *See Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502, 851 P.2d 122, 127 (App. 1992) ("[A]n issue raised for the first time in appellant's reply brief comes too late."); *Amfac Distrib. Corp. v. J.B. Contractors, Inc.*, 146 Ariz. 19, 27, 703 P.2d 566, 574 (App. 1985) (appellant is precluded from raising issue for the first time in a reply brief); Ariz. R. Civ. App. P. 13(c), 17B A.R.S. Nor do we address Behrens' argument that § 33-1551 does not apply to "non-owners" such as City employees. As we later explain, the trial court did not abuse its discretion in denying Behrens' motion to amend his complaint to add City employees as defendants and properly dismissed, on statute of limitations grounds, identical claims made in his second action, CV-200500510.

Trial Court's Grant of Summary Judgment to the City

¶14 Behrens contends that, even if § 33-1551 applies, he has produced sufficient evidence of wilful misconduct to withstand summary judgment. A trial court properly grants

[3]We reject Behrens' argument that the City "failed to support its motion [for summary judgment] by submitting evidence to support an essential element of the claim" that § 33-1551 applies to Behrens' claims. Whether the statute applies is purely a question of law. *See Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 5, 71 P.3d 359, 361 (App. 2003). Accordingly, there is no "evidence" for the City to submit to support its argument that § 33-1551 applies.

summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(c), 16 A.R.S., Pt. 2; *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998). A trial court should grant a motion for summary judgment only "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

¶15 As we earlier noted, § 33-1551 exempts the City from liability "except upon a showing that [it] was guilty of wilful, malicious or grossly negligent conduct which was a direct cause of the injury to [Behrens]." The statute defines gross negligence as "a knowing or reckless indifference to the health and safety of others." § 33-1551(C)(2). Our supreme court has defined wilful misconduct as "intentional, wrongful conduct, done either with knowledge that serious injury to another probably will result or with a wanton and reckless disregard of the possible results." *S. Pac. Transp. Co. v. Lueck*, 111 Ariz. 560, 563, 535 P.2d 599, 602 (1975).[4] "Gross negligence is generally a question of fact that is

[4]In his opening brief, Behrens argued the trial court "should not have inferred an overly burdensome standard for plaintiffs to establish 'reckless misconduct.'" But in its conclusions of law on this issue, the trial court relied on the definition of gross negligence

determined by a jury." *Armenta*, 205 Ariz. 367, ¶ 21, 71 P.3d at 365. "We may resolve this issue as a matter of law, however, if the plaintiff fails to produce evidence that is 'more than slight and [that does] not border on conjecture' such that a reasonable trier of fact could find gross negligence." *Id., quoting Walls v. Arizona Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991) (modification in *Armenta*).[5]

¶16 The City acquired Rancho Grande Park in 1975. In 1984, the City's liability insurer made a series of recommendations to the City to improve safety at the City's parks. A May 16, 1984, letter from the insurer to the City stated that it was "critical[ly] importan[t] . . . [to] maintain[] an effective 'cushioning' surface immediately under such playground equipment as swings and sliding boards to help absorb the shock of a falling child and thus minimize the injuries received by the child." Other letters requested the City maintain centralized files of loss and accident records, establish procedures for investigations of accidents, and have more frequent inspection of recreational facilities. A 1985 letter from

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found in A.R.S. § 33-1551(C)(2) and the standards set by *Lueck* and *Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 844 P.2d 623 (App. 1992), the same sources Behrens both relies upon now and cited to the trial court. The trial court used the correct standard.

[5]In his opening brief and again at oral argument in this court, Behrens cites *Lueck* for the proposition that, "[w]here the evidence discloses several acts of negligence, whether gross or wanton negligence is established is a matter for the jury." 111 Ariz. at 563, 535 P.2d at 602. As he did in his opposition to summary judgment in the trial court, Behrens does not develop this argument further in his briefs to this court. Neither does he explain how the quoted language from this factually distinguishable case, which also appears to us to be dicta in the circumstances of that case, applies to the various and temporally disparate negligent acts of several City employees that he asserts. We also note that this quote from *Lueck* has not controlled the outcome of any subsequent case. We therefore do not consider this argument.

the insurer praised the City for "tak[ing] action, or [being] in the process of taking action, on all the previous 1984 and 1985 recommendations made to the City." Nearly nine years later, a 1994 letter from the insurer stated that its inspection revealed "the parks to be well maintained and housekeeping in the park areas [to be] good."

¶17 To avoid injury from falls, the City's policy was to have sand twelve inches deep placed around playground equipment to act as a cushioning material. This depth would be consistent with safety manuals from equipment manufacturers and consumer product safety groups that Behrens asserts were found in the City's files.

¶18 David Mejia was responsible for maintenance and inspection of twenty-six City parks and was expected to inspect them weekly. He stated he visited each park once or twice a week to perform not only the inspection but any other necessary work. Although he was initially told to prepare a weekly report on the condition of each park, he admits he only composed the reports every two weeks "because sometimes there was nothing wrong at different parks." In late 1997 through early 1998 there was an approximately five-month period of time for which no reports could be found, but Mejia testified he "probably made them and . . . lost them."[6] The reports went to Jerry Sullivan, Mejia's supervisor, who filed them and testified that, although he may have reviewed the reports, "[i]f there was a problem in the parks, it would be passed on [by Mejia to him] verbally."

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[6]Reports were also missing for an approximate two-month period immediately after Behrens' accident in 2000.

¶19 In his reports, Mejia addressed various park conditions, and rated whether conditions were excellent, good, acceptable, poor, or dangerous. With respect to the sand that was to provide cushioning beneath the playground devices, he rated the sand acceptable when it was not hazardous and reasonably safe for its intended purpose but that "it was starting to, maybe, go low." For several months prior to the accident, Mejia had rated the sand as "acceptable."

¶20 Mejia understood the sand was present to cushion falls and he would "fluff" the sand "every once in a while." He also would "shovel back the sand that was pushed out [of position] every week." He stated he was not instructed as to the specific depth of the sand but did go to a seminar where he learned this information, although he was not able to remember a specific depth. However, he estimated that the usual depth of sand at points where it might cushion falls in Casa Grande playgrounds was about six inches. About once or twice during his four years in the position, as of January 2003, Mejia had added sand to Rancho Grande Park, although this was apparently after the accident.

¶21 In her affidavit, Behrens' wife stated that when she had arrived at the scene of the accident, the sand around the perimeter of the merry-go-round was "worn . . . completely down to hard ground." She also stated "all the surface sand in the playground area was shallow." She went back to the park about seven months later with a playground expert, found "the sand [to be] not light and fluffy like most parks," and stated the condition of the playground at this time was "approximately the same" as at the time of her husband's injury.

¶22 Ron Wood, the park superintendent for the City, admitted during his deposition that he had visited the park the day after the accident and that there was not twelve inches of sand in the pathway around the merry-go-round. Wood also testified he was aware that, several years before, a teenager had broken his leg on a different type of merry-go-round designed for small children in another Casa Grande park after getting his foot stuck in the equipment. He also testified that he knew the City of Phoenix had removed its merry-go-rounds some years before, although he was not aware of the reason it had. The merry-go-round from which Behrens fell did not have a speed governor on it, but Wood was unaware "of a standard requiring some sort of modification" for merry-go-rounds that had been installed without speed governors.

¶23 Paul Hogan, a certified playground safety inspector, stated in his affidavit "that if there had been a speed regulator on the merry-go-round and a soft, forgiving surface of loose non-compacted sand in accordance with recommended practice, [Behrens] would not have been seriously injured, or would not have been injured at all." He also testified about Mejia's allegedly inaccurate and infrequent inspection reports, the City's inadequate risk management/accident prevention measures, and the City's failure to train and supervise Mejia and to add and "fluff" sand.

¶24 Terry Anderson, an expert in loss prevention, stated in his affidavit that the City knew for more than twenty years about the importance of impact absorbing material on a playground, knew that a child had been injured in 1995 in a merry-go-round accident

caused by spinning the equipment too fast, and that the City should have maintained the sand "on a daily basis." He also stated the City had improperly trained its park workers, failed to follow the advice of its insurer, and that Mejia "did not have the time and knowledge to maintain [all twenty-six] parks."

¶25 A third expert, Phyllis Rowe, stated in her affidavit that the Consumer Product Safety Commission recommends speed governors "to limit [the] speed of merry-go-rounds to 13 feet per second to prevent users from being thrown from the platform by centrifugal force." Rowe also stated the surface of the City's merry-go-round was slippery and that her inspection of the playground six months after the accident, "to gain a sense of the level of care" utilized by the City, revealed "numerous safety violations." She also testified "[m]erry-go-rounds have almost disappeared from public playgrounds in the past 8-10 years because of the large number of injury accidents associated with this equipment," and that she was unaware of any other city in Arizona that still had merry-go-rounds in public playgrounds.

¶26 Behrens relies primarily on *Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 844 P.2d 623 (App. 1992), to argue that the City was grossly negligent. There, defendants owned land on a bowl-shaped river bed on which people rode their all-terrain vehicles. 173 Ariz. at 457, 844 P.2d at 624. The land was used by defendants for mining, and they occasionally told the riders that they were trespassing, but they made no effort to prevent the riders' use of the river bed. *Id*. Defendants began to excavate a gravel pit near the river, and gradually the distance between the bowl and the gravel pit shrunk from about

one hundred feet to about fourteen feet. *Id*. The pit could not be seen from the bowl and there were no fences or barriers around the pit. *Id*. The day before the plaintiffs' accident another rider had fallen into the pit and died. *Id.* at 457-58, 844 P.2d at 624-25. There had been no previous accidents on the property and defendants were not aware of the accident that had occurred the day before the plaintiffs fell into the pit and were injured. *Id*. at 458, 844 P.2d at 625. Although the plaintiffs had used the area before, on the day of the accident they had not investigated the distance between the bowl and the pit. *Id*. at 457, 844 P.2d at 624. The court concluded that "a reasonable juror could find that the defendants knew that [all-terrain vehicles] were in the bowl area, knew of the risk of serious injury to riders, recklessly disregarded that risk by failing to warn or guard against the dangerous condition caused by the closeness of the pit to the bowl area, and therefore may have violated A.R.S. section 33-1551(C)." *Id.* at 462, 844 P.2d at 629.

¶27 Behrens also relies on two Ninth Circuit Court of Appeals cases, *Miller v. United States*, 945 F.2d 1464 (9th Cir. 1991), and *McMurray v. United States*, 918 F.2d 834 (9th Cir. 1990), both finding wilful or malicious governmental conduct. In *Miller*, the court reversed a grant of summary judgment to the United States under Arizona law because the United States admitted that, despite knowing a roadway was used by off-road vehicles, it nonetheless removed a metal culvert that crossed over a wash leaving a "large, gaping area," knowing the absence of the culvert presented a dangerous condition to users of the road, and that it had failed to warn or guard against the dangerous condition. 945 F.2d at 1465-66. In

McMurray, the court affirmed the district court's finding of wilful conduct under Nevada law when the United States knew the public had unrestricted access to a natural hot spring, was on notice that other people had been burned in this hot spring, and welcomed people to the site. 918 F.2d at 835, 837 n.2, 838.

¶28 In the present case, the trial court found there was no evidence that any of the City employees

> understood that merry-go-rounds, in and of themselves, created an unreasonable risk of harm, or that the lack of frequent fluffing at least 12 inches of sand would create a "high degree of risk or a risk of serious harm." Additionally, there is no evidence to get to a jury that any of the Defendant employees, conscious of such an unreasonable risk of harm, proceeded without concern for public safety. . . .
>
> While there might be a question of negligence in Mejia's performance of his inspection[s] or maintenance responsibilities, there is no evidence that he had knowledge of dangerous conditions and that he callously and willfully disregarded his maintenance duties, consciously disregarding the danger to users.

We agree with the trial court that what is absent here, but was present in *Newman*, *Miller*, and *McMurray*, was evidence of "a wanton and reckless disregard of the possible results." *Lueck*, 111 Ariz. at 563, 535 P.2d at 602.

¶29 The trial court found the City had "a generalized awareness that playground equipment can sometimes be dangerous," but lacked "actual knowledge of the dangerous condition its merry-go-rounds [may have] presented." Although five years before Behrens was injured a child suffered a broken leg on a merry-go-round when he was going too fast,

that injury occurred in another park on a different type of merry-go-round when an older child was riding a merry-go-round designed for younger children. This single incident provides insufficient evidence to present a jury question on the issue of gross negligence that the City knew or recklessly disregarded that all of its merry-go-rounds were unsafe and could cause injury. The general warnings by the insurer of the importance of adequate cushioning at the City's parks are also insufficient for a reasonable jury to find gross negligence on behalf of the City. Although there is some expert testimony to the contrary, "[e]xpert opinions, without more, do not necessarily render a plaintiff's allegations of gross negligence triable issues of fact." *Badia v. City of Casa Grande*, 195 Ariz. 349, ¶ 30, 988 P.2d 134, 142 (App. 1999). And Behrens presented no evidence that any City employees knew or should have known that merry-go-rounds without speed governors are inherently unsafe.

¶30 Also, the facts in *Newman*, *Miller*, and *McMurray* are readily distinguishable from those of the present case because here the City was taking affirmative steps to maintain the playground. The evidence established that Mejia visited each park at least once a week and inspected it for safety concerns, that he filled out inspection forms every two weeks, that he shoveled back displaced sand when he visited the park, and had at least some training and supervision in his role. Whether he could have done a better job in fulfilling his responsibilities could be a jury question on the issue of negligence, but does not present one on gross negligence. We agree with the trial court that Behrens has failed to present evidence sufficient for a reasonable jury to find the City was grossly negligent or committed

wilful or malicious conduct, and therefore affirm the trial court's grant of summary judgment to the City. *See Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.[7]

Negligence Claims Against City Employees

¶31 In August 2004, before the trial court ruled on the City's motion for summary judgment, Behrens requested leave to amend his complaint to add individual claims against City employees Mejia, Wood, Sullivan, City manager Ken Buchanan, and risk manager Scott Barber. The court denied the motion, stating "[t]he time for asserting individual claims against those defendants is long past" and that permitting Behrens to amend his complaint would "prejudice the individual defendants." Behrens contends this denial was erroneous. We review a trial court's denial of leave to amend a complaint for an abuse of discretion. *Hayden Bus. Ctr. Condos. Ass'n v. Pegasus Dev. Corp.*, 209 Ariz. 511, ¶ 25, 105 P.3d 157, 161 (App. 2005). "This court will not resolve statute-of-limitations issues based upon disputed facts, although we will review questions of law de novo." *Premium Cigars Int'l. Ltd. v. Farmer-Butler-Leavitt Ins. Agency*, 208 Ariz. 557, ¶ 46, 96 P.3d 555, 568 (App. 2004) (citations omitted).

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[7]Behrens also contends the trial court "improperly weighed the 'quality' of the evidence." Behrens is correct in noting the court used the word "quality" in its decision, including stating the City employees' "cumulative inattention or lack of concern lacks the 'quality' of recklessness or disregard necessary for a gross negligence jury trial." However, read in context, the trial court was simply stating that Behrens had failed to present "evidence that is 'more than slight and [that does] not border on conjecture'" on the issue of gross negligence. *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 21, 71 P.3d 359, 365 (App. 2003), *quoting Walls v. Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 595, 826 P.2d 1217, 1221 (App. 1991) (alteration in *Armenta*).

¶32 Section 12-821, A.R.S., provides that the statute of limitations for "[a]ll actions against any public entity or public employee" is one year. And § 12-821.01(A) requires a person who has "claims against a . . . public employee" to file the claims with that person "or persons authorized to accept service for the . . . public employee . . . within one hundred eighty days after the cause of action accrues." Behrens did not file a claim under § 12-821.01 until the same day he sought to amend his complaint, more than four years after his accident.

¶33 However, Behrens argues that he was unaware of whose negligent conduct had caused his injuries until he discovered some new evidence in early 2004. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995). "The cause of action does not accrue until the plaintiff knows or should have known of both the *what* and *who* elements of causation." *Lawhon v. L.B.J. Institutional Supply, Inc.*, 159 Ariz. 179, 183, 765 P.2d 1003, 1007 (App. 1988). "The rationale behind the discovery rule is that it is unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for believing that a claim exists." *Gust, Rosenfeld & Henderson*, 182 Ariz. at 589, 898 P.2d at 967.

¶34 We agree with the trial court that, as a matter of law, Behrens could have and did identify the individual City defendants years before he attempted to amend his complaint to add them. His complaint focused, in part, on the doctrine of respondeat superior. To this

end, Behrens indicated as early as November 2002 that he wanted to depose Mejia and Wood. These depositions were eventually taken in January 2003. In these depositions, Mejia and Wood both mentioned the importance of cushioning material on playgrounds and Wood indicated that it was the City's policy to provide a twelve-inch sand cushion. Mejia discussed his training for the position and he and Wood discussed how Mejia was supervised. Mejia stated that his reports went to Sullivan and testified how Sullivan responded to them. Both Wood and Mejia discussed the overall responsibilities of Sullivan, Buchanan, and Barber towards the parks, and risk management in general. After extensively deposing Mejia and Wood, Behrens was certainly aware of their identities and what their respective roles related to Behrens' accident had been; their testimony clearly made Behrens aware of the other three City employees and what their possible roles had been.

¶35 Moreover, Behrens' initial response to the City's motion for summary judgment, filed in March 2003, mentions Mejia, Wood, Sullivan, and Buchanan by name. It also alleges in part that the negligence of Mejia, Wood, and Sullivan caused Behrens' injuries, focusing on the lack of sand, proper training, and proper risk management procedures. Therefore, we can determine as a matter of law that Behrens "kn[ew] or, in the exercise of reasonable diligence, should [have] know[n] the facts underlying the cause"

against the five City employees considerably more than a year before August 2004. *Gust, Rosenfeld & Henderson*, 182 Ariz. at 588, 898 P.2d at 966.[8]

¶36 Behrens argues that the letters from the City's insurer were new evidence that would justify tolling the statute of limitations because they were an "express warning" notifying the City of the risk of serious injury from falls without adequate cushioning as well as the need to maintain proper risk management policies. But both Mejia and Wood testified in their initial depositions about the need for adequate cushioning on the playground to prevent serious injury from falls, and Wood testified that it was the City's policy to provide sand twelve inches deep to do so. And these depositions revealed the risk management policies of the City and who was responsible for implementing them. The letters from the

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[8]Behrens' attempt to amend his complaint after the court determined § 33-1551 applied to his claims against the City appears to have been based on his belief that the Recreational Use statute does not protect the five City employees. Therefore, Behrens believes "[t]he standard of proof for the[] claims [against the employees] is mere ordinary negligence; however, the City remains *vicariously liable* for negligence of its employees based on a theory of *respondeat superior*." Behrens cites no authority in his opening brief to support his assertion that the immunity granted by the Recreational Use statute can be bypassed in this way, and this position appears to be contrary to law. *See Manning v. Barenz*, 603 A.2d 399, 402 (Conn. 1992) ("To hold [that employees are not covered by the Recreational Use statute] would render the statute meaningless. The plaintiffs could completely bypass this legislation by simply bringing suit against the municipal employee and then requiring the municipality to indemnify its employee."), *overruled on other grounds by Conway v. Town of Wilton*, 680 A.2d 242 (Conn. 1996); *Rankey v. Arlington Bd. of Educ.*, 603 N.E.2d 1151, 1153 (Ohio Ct. App. 1992) ("[T]he appellees, as employees of the respective boards of education, are also cloaked with the exemption [provided by Ohio's Recreational Use statute], so long as they were acting within the scope of their employment."); *see also* Restatement (Second) of Agency § 343 cmt. c (1958) ("[I]f the principal owes less than the normal duty of care to a person, the agent, in performing his principal's business, owes no more.").

insurer are simply not evidence qualitatively different than what Behrens had been alleging as early as 2003.[9]

¶37 Behrens also contends that the depositions of Buchanan, Sullivan, and Barber in March and April of 2004 "resulted in new evidence of culpable misconduct by these individuals." However, because Behrens does not tell us what this new evidence was, we do not address this argument. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. (brief must contain "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) ("This assertion is wholly without supporting argument or citation of authority, and accordingly[,] we reject it."); *see also Cooney v. Phoenix Newspapers, Inc.*, 160 Ariz. 139, 141, 770 P.2d 1185, 1187 (App. 1989) (plaintiff has burden of establishing that statute of limitations tolled "because the complaint shows on its face that the cause of action is barred").

¶38 We agree with the trial court that the statute of limitations expired before Behrens sought to amend his complaint in August 2004, and therefore conclude the trial court did not abuse its discretion in denying Behrens leave to amend. *See Hayden Bus. Ctr. Condos. Ass'n*, 209 Ariz. 511, ¶ 25, 105 P.3d at 161. For the same reason, the trial court also

[9]Because of this conclusion, we need not address Behrens' argument that the City's alleged concealment of these letters should toll the statute of limitations.

did not err in dismissing Behrens' new complaint filed against the five City employees in April 2005.

¶39 Finally, Behrens argues the trial court erred in denying Harleigh Behrens the opportunity to amend her loss of consortium complaint to add as defendants the five City employees because she is a minor. Although ordinarily a child's minority tolls the statute of limitations, *see* A.R.S. § 12-502, here Harleigh's claim derives from her father's claim. *Villareal v. Ariz. Dep't of Transp*., 160 Ariz. 474, 481, 774 P.2d 213, 220 (1989). ("A child's claim for loss of consortium is derivative of the parent's claim for personal injuries. Defenses good against the parent will be good against the child."). The trial court therefore did not err in denying Harleigh leave to amend her complaint.

Disposition

¶40 We affirm the trial court's grant of summary judgment in favor of the City of Casa Grande. We also affirm the trial court's denial of Behrens' motion for leave to amend his complaint and its dismissal of Behrens' second cause of action against the five City employees.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge